IN THE HIGH COURT OF BOMBAY

CRIMINAL MISCELLANEOUS APPLICATION NO.157 OF 2005

Mr. Abdul Rehman M. Mulgand,
Civil Contractor,
Having office and residence at
House No.145,
Airport Road,
Dabolim, Goa. ...Petitioner
(Original Complainant)

V e r s u s

1. Shri Mohammad Hashan Mulgand,
Nava Ayodhyanagar,
Near Water Tank,
Old Hubli,
Hubli – 580024,
State of Karnataka. ...(Original accused)

2. State through Public
Prosecutor, High Court, Panaji. ...Respondents

Shri Shivanand Singbal, Advocate for the petitioner/complainant.

Shri B.S. Assunde, Advocate for respondent no.1.

Shri S.N. Sardessai, Public Prosecutor for respondent no.2.

CORAM: N. A. BRITTO, J.

DATE : 5th October, 2005

ORAL JUDGMENT

Admit. Heard forthwith.

2. Heard Shri Singbal, learned Advocate on behalf of the petitioner and Shri Asunde, learned Advocate on behalf of the respondent no.1, who are both brothers and were complainant and accused respectively in a criminal case filed by the former against the latter under Section 138 of the Negotiable Instruments Act(the Act, for short). The present application filed by the complainant is treated as a revision application against the order dated 11.5.05 of the learned Sessions Judge, Margao.

3. The complainant having filed the said complaint, the learned Judicial Magistrate, First Class, by his order dated 25.10.04 was pleased to issue process against the accused under Section 138 of the Act but the accused having filed a revision application before the learned Sessions Judge, Margao, being criminal revision application 12/05, the learned Sessions Judge was pleased to allow the said revision and set aside the order of the learned Judicial Magistrate, First Class dated 25.10.04.

4. The case of the complainant was that the accused issued to the complainant a cheque bearing no.223004 dated 26.3.04 drawn on UCO Bank, Hubli for a sum of Rs.79,800/-

towards payment of hire charges of centering plates, which cheque when presented by the complainant through Punjab National Bank, Vasco-da-Gama was returned dishonoured. In fact, as can be seen from the memo of dishonour, the said cheque was dishonoured with two endorsements namely "(19) account number required" and "(20) proprietary not marked". It has now been explained by Shri Assundi, learned Advocate for the accused that this last endorsement relates to the accused having not put his business rubber stamp on the said cheque and regarding this explanation no grievance is made on behalf of the complainant.

5. The complainant presented the said cheque again on 8.6.04, which according to learned Advocate of the complainant, was returned with the same endorsement. The complainant sent a legal notice to the accused on 5.7.04. On the said legal notice, admittedly, there was a mistake in relation to the number of the cheque as well as the date thereof. The number was mentioned as 223304 instead of 223004 and the date was mentioned as 22.5.04 instead of 26.3.04. The amount of the cheque was correctly mentioned as Rs.79,800/-. The accused replied to the said notice vide his reply dated 19.7.04. In the said reply the

accused stated that he had not issued any cheque to the complainant and that he had also not hired any centering plates from the complainant. On behalf of the accused, however, it was stated that the accused had an account in UCO Bank, Hubli about 8-10 years back

6. The complainant wrote a letter dated 29.7.04 to the Branch Manager, UCO Bank, Hubli, asking for particulars as to on which account number, cheque number 223304 was issued by their Bank and it appears that the said Bank was not inclined to give any information about the matter. It may be noted that the cheque number on this letter also was wrongly mentioned on behalf of the complainant.

7. The complainant therefore filed the complaint and the learned Judicial Magistrate, First Class, as already stated, by order dated 25.10.04 was pleased to issue process against the accused under Section 138 of the Act.

8. The learned Sessions Judge has reversed the order issuing process against the accused on two counts. Firstly, in relation to the mistakes made in the notice issued by the

complainant to the accused.

9. As regards the notice, the learned Sessions Judge noted that in the legal notice the number of the cheque was shown as 223304 dated 22.5.04 whereas the cheque bore no.223004 dated 26.3.04 but a perusal of original cheque shows that it was presented on 22.5.04 as well as on 8.6.04 and these mistakes were not bonafide. In fact, the complainant time and again has been making mistakes in the dates whether they are of the cheque or whether of presentment. Even before this Court the complainant has stated that the cheque was presented twice on 22.5.05 and 8.6.05, but, it is not disputed that the case of the complainant otherwise, is that the cheque was having no.223004 and was dated 26.3.04 but was presented on 22.5.04 and 8.6.04 to Punjab National Bank, Vasco-da-Gama. The finding of the learned Sessions Judge that the complaint deserved to be dismissed for the said mistakes is not supported on behalf of the accused as well. The complainant's notice dated 5.7.04 had clearly mentioned the amount of the cheque as Rs.79,800/- and that the complainant had drawn the same on UCO bank, Hubli Branch. On this aspect Shri Singbal on behalf of the complainant has placed reliance on a judgment of this Court in

the case of **Prashant Prabhakarrao Gite v. S.K. Sarkar (2002 (2)Mh.L.J. 125)** wherein this Court has stated that sub-clause (b) of the proviso to Section 138 of the Act only requires notice to be given in writing by the payee to the drawer in which there should be a demand made by the payee and that this clause does not prescribe any form or format for such notice. In the absence thereof what has been contemplated by this clause is the communication in writing by the payee to the drawer asking the drawer to pay the amount involved in the cheque which is dishonoured. Shri Singbal has also placed reliance on the case of **Kavuri Suwarna Bala Sundaram v. Karmati Poorna Chandra Rao & anr.(2004(1) DCR 518)** wherein the A.P. High Court observed that when Section 138 of the Act contemplated that only the amount covered by the dishonoured cheque, but not its number, to be mentioned in the notice contemplated by that section, it was not necessary for the drawer to mention the number of the cheque, for the drawer to comply with the demand made in the notice since the drawer have 15 days to comply with the demand made ... etc. The Court held that only because there was a variation in the number of the cheque mentioned in the notice and in the body of the complaint and the cheque that was filed into Court was of no consequence

when in the notice of demand the amount covered by the dishonoured cheque was correctly mentioned. In the case at hand, the complainant's notice had the necessary and material particulars regarding the bank's name and the amount of the cheque in case the accused wanted at all to comply with the same and therefore in my view, the complaint could not have been dismissed for mixing up the number and the date of the cheque as mentioned in the notice and the complaint.

10. Secondly, the learned Sessions Judge has also quashed the process against the accused because the reasons assigned by the Bank why the cheque was being returned are not contemplated under Section 138 of the Act. It will be advantageous to reproduce a part of Section 138, without its proviso, which reads as follows:

> "138. Dishonour of cheque for insufficiency, etc., of funds in the account. - Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or liability, is

returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for a term which may extend to one year , or with fine which may extend to twice the amount of the cheque, or with both."

11. Shri Singbal, the learned Counsel on behalf of the complainant has submitted that the decision in the case of **Kuchil Kumar Nandi v. M/s. Modi Cements Ltd.(1997 Cri.L.J. 805)** on which reliance was placed by the learned Sessions Judge was reversed by the Supreme Court in the case of **M/s. Modi Cements Ltd. v. Kuchil Kumar Nandi(1998-(CR3)-GJX-0239).** It may be noted here that the Calcutta High Court had held that the necessary ingredients of Section 138(as underlined

hereinabove) of the Act were not mentioned by the complainant in his complaint and therefore no cognizance of the offence could be taken The Calcutta High Court had also held that the same endorsement of the Bank "payment stopped" was not sufficient to entertain the complaint as that was not the ingredient of the offence under Section 138 of the Act. Overruling the said findings or observations, the Supreme Court stated that the Court taking cognizance of the complaint under Section 138 of the Act was required to be satisfied as to whether a prima facie case was made out under the said provisions. The Supreme Court further observed that the drawer of the cheque undoubtedly got an opportunity under Section 139 of the Act to rebut the presumption at the trial and therefore the Supreme Court proceeded to hold that the complaint would not have been dismissed at the threshold and directed further inquiry.

12. Shri Singbal then submits that the endorsements of the Bank in fact amounts to saying that the account was closed. Shri Singbal further submits that this also was not a case to have been closed at the threshold by quashing the process issued against the accused. Shri Singbal has placed reliance on a decision of this Court in the case of **Shivendra Sansguiri v.**

M/s. Adinco and another(1998 ALL MR(Cri) 880). In this case the cheques were returned by the Bank with endorsement "account closed" on 3.9.1992 and this Court observed, relying on another case decided by the learned Division Bench of this Court in the case of **Rakesh Nemkumar Porwal v. Narayan Dhondu Joglekar and another(1993 Cri.L.J. 680)** that there could be so many circumstances both anticipated or unanticipated by the Legislature under which a Banker dishonours a cheque and the Legislature intended to cover all such eventualities that emanate from the present day commercial practices by implication, Further, it was observed that the Legislature certainly did not want to limit the operation of the said Section to a particular circumstance as such circumstances will be manifold in the commercial world under which a cheque could be dishnoured and the Legislature wanted in its wisdom to rope in all such circumstances that may originate in future also and that is why it used the word "etc." in the sub-title of the Section and insufficiency of funds is only one of the contingencies that can happen in the commercial transaction which results in dishonouring of a cheque. This Court therefore rejected the contention that Section 138 only takes into account one circumstance, namely, the insufficiency of funds and all other

circumstances will fall outside the purview of Section 138. The Court also observed that if the cheque is drawn it should be drawn with responsibility and in that event, if some negligible mistakes committed by the drawer such as omission for signing, corrections not being initialled, dates not being properly put, names not being properly written and also the bonafide belief that there is sufficient money in the account to honour the cheque can all be taken care of and be given 15 days time to correct or rectify these mistakes and once the cheque is issued, the law takes care to see that it is honoured failing which an erring drawer will be penalised. The case before the Division Bench in Rakesh Nemkumar Porwal(supra) was also a case where the cheque was returned with remark “insufficient funds” and at para 18 it was observed as follows:

> “A clear reading of Section 138 leaves no doubt in our mind that the circumstances under which such dishonour takes place are required to be totally ignored. In this case, the law only takes note of the fact that the payment has not been forthcoming and it matters little that any of the manifold reasons may have caused that situation. If,

for instance, the closure of an account or the stoppage of payment of any other of the commonplace reasons for dishonour were to be justifiable, then, the legislature would have set out in the section as exceptions not constituting an offence. No such intention can be read into S.138, as none exists. The solitary exception made by the Legislature with regard to the drawer being offered a final opportunity of paying up the amount within 15 days from the receipt of the notice which, in other words, provides a last opportunity to prove one's bona fides. It is obvious, that having regard to the wide-spread practice of issuing cheques which are dishonoured and the many ingenious methods of avoiding payment that are practised, that the legislature has opted for a no-nonsense situation. The possibility has not been overlooked whereby an account may inadvertently be overdrawn or a dishonour may be for technical reasons or where a

> genuine mistake has occurred and the grace period provided for by the legislature after service of notice on the drawer is in order to afford an opportunity to the drawer to rectify these. Undoubtedly, even when the dishonour has taken place due to the dishonesty of the depositor, the drawer is still given a last chance to act otherwise. Consequently, the reasons for dishonour even if they be very valid as was sought to be pointed out in this case, should not and cannot be taken into account by a Magistrate when such a complaint is presented."

13 Shri Singbal, has also placed reliance on the case of **P.N. Salim v. P. J. Thomas & another (2004(2)DCR 186)** which it appears was decided by placing reliance on the decision of this Court in the case of Sivendra Sansguiri(supra). In para 13 of the judgment the learned Judge observed that "... No doubt, if any person manages to issue a cheque without an account with the Bank concerned, its consequences would not snowball into the offence described under Section 138 of the Act. Such acts

may amount to other offences. For the offence under Section 138 of the Act there must have been an account maintained by the drawer at the time the cheque was drawn...". In the case of **Babulal Nainmal Jain v. Khimji Ratanshi Dedhia and others (1998 Cri.L.J. 4750)** the cheque was returned without payment with remarks "refer to drawer" but from the averments in the complaint it was noticed that the cheque in question was defective and was not in its proper form as expected. It was not in the from of M.I.C.R.(Not computerised form, according to counsel) and the Bank had asked them to replace it and the petitioner had refused to replace it. It was contended that the cheque was returned on account of the said defect and not due to any insufficiency of funds in the credit of the drawer of the cheque and this Court held that since the cheque was returned not because of any reasons attributable to the defrauding of the creditor or to the lack of credit, etc., it was illegal on the part of the Magistrate to issue summons on the assumption that prima facie case was disclosed against the petitioner under Section 138 of the Act. The Court further observed that if a cheque is returned on account of any structural defect i.e. any defect in its form, want of signature, date has not been properly written, figure of the amount has been overwritten or erasures in

the drawer's name, etc., the same will not amount to an offence punishable under Section 138 of the Act. The Court further observed that from the complaint it was clear that the only fault committed by the petitioner was that he had refused to replace the cheque and nothing was spelt out in the complaint about the insufficiency of funds. This Court, therefore, proceeded to quash the process issued against the petitioner.

14. Generally it is the Bank, while issuing a cheque book to an account holder that it writes the account number of the holder of the account which surprisingly the cheque in question did not have, and one of the reasons for return of the cheque is that it did not have the said account number. The other reason, as explained is that it did not have the “proprietary stamp”. Inspite of that the complainant instead of returning the cheque to the accused for correction of the said formal defects, chose to present the same for payment. As seen from Section 138 of the Act, there are two situations which the section contemplates namely, the return of the cheque (a) either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or (b) that it exceeds the amount arranged to be paid from that account by an agreement

made with that Bank. It is now well settled that when a cheque is returned either with remarks that the 'account is closed' or 'funds insufficient' or 'refer to drawer' or 'instruction for stoppage of payment' or 'exceeds arrangement' these would be covered by the expression “the amount of money standing to the credit of that account is insufficient to honour the cheque”as envisage in Section 138. In the case at hand, the cheque in question was not returned for either of the said two reasons. Section 138 of the Act is a penal provision and should be strictly interpreted and in my view no wider meaning can be given to the aforesaid expressions than what is used in the Section.

15. As already stated, the accused has disputed not only his signature on the cheque but even the very issuance thereof or for that matter that there was any liability towards settlement of dues of hire charges. The statement made on behalf of the accused in para 4 of the reply dated 19.7.04 cannot be read as if to say that it is in admission that the accused had an account in UCO Bank, Hubli prior to 8 – 10 years . This was a case where the cheque was returned dishonoured mainly because the account could not be located for want of account number or in

other words because it had apparent basic structural defect and not because the account was closed or there was insufficient funds in the account. In my view, such an endorsement will not amount to saying that the account was closed. It is rather surprising that the said cheque allegedly issued by the accused did not have the account number of the account of the accused held by him in UCO Bank, Hubli. In the absence of the account number and the stand taken by the accused in the reply it would be difficult even to come to a prima facie conclusion that the cheque was issued by the accused. In the light of that, the order of the learned Sessions Judge could not be faulted.

16. Although the conclusion arrived at is that the complainant failed to make out a prima facie case under Section 138 of the Act, the complainant would certainly be at liberty to prosecute the accused in case any other offence disclosed by issuance of such a cheuqe.

17. I find no merit in this revision and the same is therefore hereby dismissed.

N. A. BRITTO,J.